In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 729

INTERNATIONAL WOODWORKERS OF AMERICA, LOCAL UNION 3-3, AFL-CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The order of the court of appeals denying intervention (Pet. App. 19a) is not officially reported. The earlier opinion of the court of appeals enforcing the Board's order in the underlying unfair labor practice proceeding (Pet. App. 1a–7a) is reported at 356 F. 2d 88. The decision and order of the Board are reported at 145 NLRB 1539.

JURISDICTION

The order denying intervention was entered on August 9, 1968 (Pet. App. 19a). On November 11, 1968,

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Mr. Justice Douglas extended the time for filing a petition for a writ of certiorari to and including November 18, 1968. The petition was filed on November 12, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the successful charging party in an unfair labor practice proceeding may intervene in the court of appeals, after that court has entered a decree enforcing the Board's order, for the purpose of requiring the Board to show cause why it has not sought to "compel" compliance with the court's decree.

STATUTE INVOLVED

Section 10(f) of the National Labor Relations Act (29 U.S.C. 160(f)) is set forth in the petition at pp. 2–3.

STATEMENT

On February 6, 1964, the Board issued an order against the Company (Western Wirebound Box Co.), directing it, *inter alia,* to bargain in good faith with petitioner Union, to supply the Union with certain data, and, upon application, to reinstate unfair labor practice strikers to their former positions, without prejudice to their seniority or other rights and privileges (145 NLRB 1539). On February 19, 1966, the court of appeals entered a decree enforcing the Board's order (Pet. App. 8a–9a).

Since the entry of the court's decree, the Company and the Union have disagreed as to the adequacy of the Company's compliance with the decree. The Union has complained to the Regional Director and

General Counsel of the Board that most of the terms of the prior bargaining contract (which expired prior to the original unfair labor practices) were automatically renewed, that the only subjects open for renegotiation are wages and job evaluation, and therefore, that the Company has bargained in bad faith by taking the position that all conditions of employment are negotiable (Pet. Exhs. No. 3, pp. 7–8; No. 16, pp. 1–2; No. 19, p. 2; No. 38, p. 1; Nelson Affidavit, pp. 21–46).[1] The Union also has urged that the Company's reinstatement of strikers was deficient because the seniority provisions of the expired contract were not fully observed (Pet. 6–7; Nelson Affidavit, pp. 7–16). Finally, the Union has argued that the financial data supplied by the Company have been inadequate (Nelson Affidavit, pp. 49–56). The Company, on the other hand, has maintained that the court's decree has been fully satisfied.[2]

The Board has advised the Union that the agency's Regional Office has found "no merit" in the contention that the expired contract was automatically renewed and that wages and job evaluation are the only subjects open for bargaining (Appendix, *infra*, p. 10). Similarly it has advised the Union that the Company's failure to follow the seniority terms of the expired contract in

[1] The affidavit of Harvey R. Nelson and 43 exhibits were attached to petitioner's motion to intervene in the court of appeals.

[2] The petition treats reinstatement of strikers as the only major compliance issue (Pet. 6–7). But the Union also has pressed the refusal-to-bargain and production-of-information issues, which are fully delineated in the Union's own supporting papers (Nelson Affidavit, pp. 21–48, 49–56; Pet. Exhs. Nos. 2, 3, 16, 24, 36).

connection with certain layoffs in 1965 afforded no basis for further proceedings (*ibid.*).[3] Apart from those issues, no final determination of compliance has been made; factual issues remain unresolved in regard to bargaining (the parties are still at an impasse), reinstatement, and production of information. As to these questions, the Board's regional Office is continuing its investigation.

Without waiting for the Board to complete its investigation and to determine whether contempt proceedings are warranted, the Union, on July 2, 1968, petitioned the court of appeals to intervene for the purpose of compelling the Board to show cause why the court's decree "has not been complied with, and * * * why the * * * Board has not sought to compel the respondent * * * to comply with the decree" (Pet. App. 10a). The Board opposed the petition (Pet. App. 12a–18a), and on August 9, 1968, the court of appeals denied intervention (Pet. App. 19a).

ARGUMENT

1. The decision of the court of appeals denying the charging party leave to intervene for the purpose of compelling the Board, in effect, to show cause why it has not instituted contempt proceedings against the Company is in accord with this Court's decision in *Amalgamated Utility Workers* v. *Consolidated Edison Co.*, 309 U.S. 261. There, the Court determined that,

[3] The Union filed a separate unfair labor practice charge covering these layoffs, and, in April 1966, two months after the court's decree, the Regional Director refused to issue a complaint (Case No. 36–CA–1509). No appeal was taken from this decision to the General Counsel of the Board.

in the interest of establishing a uniform national labor policy, Congress conferred upon the Board, "as a public agency acting in the public interest", the exclusive power to issue complaints, seek enforcement of its orders in the courts of appeals, and institute contempt proceedings for violation of enforcement decrees (309 U.S. at 264–266). Accordingly, the Court held that the successful charging party in a Board unfair labor practice proceeding lacked standing to initiate a contempt action against the charged party in the court which enforced the Board's order (*id.* at 269–270).[4]

Contrary to petitioner's contention, nothing in *United Auto Workers* v. *Scofield* (*Fafnir*), 382 U.S. 205, has undermined the authority of *Amalgamated Utility Workers* in the circumstances of this case. In *Fafnir,* the Court held only that the successful charging party in a Board unfair labor practice proceed-

[4] The exclusive power of the Board has been repeatedly reaffirmed by this Court and the courts of appeals. Issuance of complaints: *Vaca* v. *Sipes*, 386 U.S. 171, 182; *Mayer* v. *Ordman*, 391 F. 2d 889 (C.A. 6); *Balanyi* v. *Local 1031, IBEW*, 374 F. 2d 723, 726 (C.A. 7); *United Electrical Contractors Ass'n* v. *Ordman*, 366 F. 2d 776 (C.A. 2), certiorari denied, 385 U.S. 1026. Enforcement of Board orders: *International Union of Mine Workers* v. *Eagle-Picher Mining & Smelting Co.*, 325 U.S. 335, 338; *Stork Restaurant, Inc.* v. *McLeod*, 312 F. 2d 105, 106 (C.A. 2). Institution of contempt proceedings: *Southport Petroleum Co.* v. *National Labor Relations Board*, 315 U.S. 100, 106 n. 5; *May Dept. Stores Co.* v. *National Labor Relations Board*, 326 U.S. 376, 388; *United Steelworkers* v. *National Labor Relations Board* (*H. K. Porter Co.*), 389 F. 2d 295, 298 (C.A. D.C.); *National Labor Relations Board.* v. *Kohler Co.*, 351 F. 2d 798, 806 (C.A. D.C.); *Vapor Blast Independent Shop Workers Ass'n* v. *Simon*, 305 F. 2d 717, 720–721 (C.A. 7).

ing has the right to intervene in a proceeding brought in the court of appeals to review or enforce the Board's order. As we note *infra,* the Court there recognized the continuing vitality of its earlier holding that the charging party may not intervene for the purpose of instituting a contempt proceeding.

The considerations which underlay the decision in *Fafnir* to allow *both* parties before the Board the same opportunity to be heard in the court of appeals in a case already there for decision (see *id.* at 212–216, 221–222) are not controlling where the sole issue is the right of the charging party to compel a post-enforcement compliance proceeding. To grant the charging party the power to set into motion the Board's prosecutorial machinery would frustrate Congress' determination to create a specialized public agency as the primary administrator and enforcer of the federal labor laws. See *Garner* v. *Teamsters Union, Local 776,* 346 U.S. 485, 490–491; *San Diego Building Trades Council* v. *Garmon,* 359 U.S. 236, 242–243. For the Board could thereby be compelled to institute a contempt action when it believed that compliance could more readily be achieved through voluntary negotiations or a supplementary administrative proceeding, or where, as here, it was still in the process of investigating the complex facts underlying the compliance issue (see Pet. App. 13a–14a). Accordingly, the Court expressly indicated in *Fafnir* that its rationale did not encompass the contempt situation (382 U.S. at 220–222):

> We find nothing inconsistent in denying the right of a private party to institute a contempt

> proceeding—*where the Board's expertness in achieving compliance with orders is challenged*—and, on the other hand, in permitting intervention in a proceeding already in court for decision. * * * [Emphasis added.] [5]

2. Petitioner's argument (Pet. 15–16) that it is not trying to compel a contempt proceeding, but only to obtain a clarification of certain aspects of the court of appeals' decree, is refuted by the express terms of petitioner's motion for intervention (Pet. App. 10a):

> The moving party herein desires to intervene for the purpose of compelling the National Labor Relations Board to show cause * * * why the decree of this Court * * * has not been complied with, and * * * why the National Labor Relations Board has not sought to compel the [Company] to comply with the decree of this Court.

Had the order sought by petitioner been granted, the Board would have been forced to litigate in the court of appeals the basic issue of any contempt action—whether the Company had complied with the court's decree. The inevitable result of that litigation would have been an adjudication on the merits of the Company's liability to contempt sanctions, even though the Board, in the exercise of its informed discretion,

[5] In *United Steelworkers* v. *National Labor Relations Board* (*Luxaire, Inc.*), 393 F. 2d 661, 664 (C.A.D.C.), *Scofield* was argued as a basis for allowing the charging party to take part in the shaping of the complaint. The court rejected this "strained" interpretation of *Scofield* as "unpersuasive."

did not consider a contempt proceeding appropriate at that time.[6]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Solicitor General.

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National Labor Relations Board.
DECEMBER 1968.

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[6] This Court's decision in *Missouri-Kansas Pipe Line Co.* v. *United States*, 312 U.S. 502, provides no support for petitioner's position. There, the Court held only that the private party beneficiary of a consent decree in a government antitrust action may intervene in a subsequent proceeding brought by the government to reform the decree. That decision, like *Scofield*, does not establish a private right to compel action by an administrative agency.

APPENDIX

OCTOBER 3, 1968.

Re N.L.R.B. *v.* Western Wirebound Box Co., CA-9, No. 20,046.

Mr. JOHN SILARD,
Rauh and Silard,
1001 Connecticut Avenue, NW.,
Washington, D.C. 20036.

DEAR MR. SILARD: I have your letter of September 30, 1968, concerning the above case. We now have the Regional Office's report. As we understand the controversy, the Union has contended that the Company is failing to comply with the requirements of the outstanding decree because:

(1) The Company contends that all terms and conditions of employment are subject to negotiation at this time while the Union contends that the 1961 contract has renewed itself with exception of the provision on wages and job evaluation, so that only the latter subjects are now open for negotiation;

(2) The Company has failed to furnish the Union certain information which the Union requested—

(*a*) in order to ascertain whether the reinstatement provisions of the decree have been complied with; and

(*b*) to substantiate the Company's position that a wage increase would adversely affect its competitive situation;

(3) The Company has failed to follow seniority in certain personnel actions, specifically with respect to layoffs in 1965.

With respect to these contentions, the Region has concluded:

(1) There is no merit to the Union's contention that the contract had renewed itself and that only the subjects of wages and job evaluation were open for bargaining since the employer's 1962 notice to open the contract for negotiation and revision was not confined to any particular subject or subjects and since in fact until 1965 both parties conducted the bargaining without any restrictions on the subject of bargaining;

(2) While some information on the subjects noted above has been furnished by the Company, additional information is yet to be supplied, but the Region is hopeful that the Company can be persuaded to furnish it; and

(3) Aside from other considerations, including the fact that few employees were affected by the alleged disregard of seniority, the Union's contention in this regard was the subject of a charge filed by it in 1965; this charge was dismissed by the Region and no appeal was filed from the dismissal.

We have requested the Region to promptly require the Company to furnish the remaining information referred to above and thereupon to submit its report to us as to whether full compliance has been achieved.

Yours truly,

DOMINICK L. MANOLI,
Associate General Counsel.

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